

"A LA CARTE" JUSTICE FOR TRANSNATIONAL CORPORATIONS?

POSITION PAPER

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**RIGHTS FOR PEOPLE,
RULES FOR CORPORATIONS**



**TERRE
SOLIDAIRE**
Soyons les forces du changement

“A LA CARTE” JUSTICE FOR TRANSNATIONAL CORPORATIONS?

Today, there is no binding international legal framework to establish the liability of transnational corporations (TNCs) in the area of human rights and environmental protection, nor is there any guaranteed access to justice and remedies for populations affected by the activities of TNCs. At a time when 3,400 trade and investment agreements protect the interests of transnational corporations through Investor-State Dispute Settlement (ISDS) mechanisms, there is no international treaty requiring these large corporations to uphold human rights and environmental protection.

This position paper highlights the many processes underway in several European countries, the EU and the United Nations to bring an end to this parallel legal system and to compel transnational corporations to respect human rights and the environment.

KEY MESSAGES

- International law protects the interests of companies at the expense of protection for human rights and the environment. A reform of European and international legal systems is necessary to overcome these shortfalls and this contradiction.
- The French law on the duty of vigilance, passed in 2017, has set a standard throughout the world. France must therefore ensure its effective application and reinforcement. The EU and UN institutions can build upon many of its elements and expand internationally.
- The mechanisms of Investor-State Dispute Settlement (ISDS) included in trade and investment treaties are a proven threat to human rights, they exacerbate climate change and undermine environmental protection and democracy. It is urgent to bring an end to this parallel justice system.

REGAINING CONTROL

ON 18 SEPTEMBER 2009, an arbitral tribunal required Mexico to pay 77.3 million dollars to the American agrifood giant Cargill for having introduced a tax on high-fructose corn syrup in an attempt to curb obesity.

SIX YEARS AFTER THE COLLAPSE OF THE GARMENT FACTORIES IN RANA PLAZA, BANGLADESH, in which 1,138 workers died, not one of the transnational corporations implicated in the disaster has been brought to justice.

These two examples alone reveal the selective “à la carte” justice system that benefits transnational corporations.

ON THE ONE HAND, SPECIAL COURTS grant transnational corporations the power to bypass national jurisdictions and sue States that threaten their interests. Since the creation of the Investor-State Dispute Settlement (ISDS) system, more than 940 complaints have been registered, and more than 88 billion dollars from public funds have been paid to transnational corporations by States whose wrongdoing consisted of defending court rulings and policies in the public interest.

ON THE OTHER HAND, THE FUNDAMENTAL RIGHTS OF PERSONS AFFECTED by the activities of TNCs are being trampled and they have to fight for years in an attempt to obtain justice, often to no avail. It is a David and Goliath situation, in which the defendants are threatened and intimidated, and must grapple with international law that has always carefully avoided regulating the conduct of transnational corporate actors.

In response to this unfair international legal system, more than 600,000 European citizens are demanding **“Rights for people, Rules for corporations”** and are asking the European Union and its Member States to safeguard democratic ideals, guarantee the respect of human rights and protection of the environment and ensure access to justice for people affected by the activities of transnational corporations.

Legislative procedures and governmental negotiations underway in the European Union and the United Nations are unique political opportunities to curtail the impunity of large corporations.

This position paper reports on the findings that form the basis of this citizen mobilization, and offers guidelines to bring an end to this unjust system.

“The international legal system protects criminals in the private sector and leaves individuals defenceless.”

Pablo Fajardo, lawyer for the 30,000 victims of Chevron-Texaco in Ecuador

OUR ANALYSIS

ACCESS TO JUSTICE: AN OBSTACLE COURSE

The fragmentation of companies into supposedly independent subsidiaries and the increasing use of contracts and outsourcing are today major obstacles for people trying to obtain justice when their fundamental rights are trampled underfoot by transnational corporations.

In the wake of the Rana Plaza collapse, lawyers for the victims had extremely limited recourse to compensation from Bangladesh's courts because the contracting companies had no assets in the country. **In such circumstances, the procedures stretch on for years and rarely lead to solutions that are satisfactory for the victims.** In this particular case, it took nearly two years for the families of the victims to receive compensation from an ad hoc fund raised through voluntary contributions from the TNCs implicated in the disaster. As shown in the report, [The Broken Lives of Rana Plaza](#), the compensation paid out by the Rana Plaza Donors Trust Fund was paltry at best. The families of the deceased received a little less than 10,000 euros each. The survivors, who were left severely disabled from the disaster and unable to return to work, received indemnities on the order of 1,800 euros, hardly enough to cover their immediate health costs.

Ensuring that legal liability of the contracting companies is recognized and encompasses as well the actions of their subsidiaries, suppliers and subcontractors abroad **in order to obtain damages in proportion to the harm suffered**, is a difficult challenge. The parent companies take advantage of many instances of legal limbo thanks to their many subsidiaries and contract clauses tying them to their suppliers in order to escape all liability. For example, in 2008, leaks in two pipelines owned by the oil giant Shell caused a full-blown ecological disaster in the Niger Delta. The pollution of land and water exposed the populations to serious health hazards and made farming and fishing impossible. It took nearly ten years for the decontamination work to get started. When the affected communities tried to obtain compensation from Nigerian and British courts, the parent company **repeatedly refused to accept its responsibility**, arguing that it was not responsible for the negligence of its Nigerian subsidiary, even though the parent company was the sole owner of the subsidiary...

In such situations, courts in the contracting companies' country of origin have a specific responsibility to make sure that the companies domiciled in their jurisdiction are not complicit in serious violations abroad of human rights and environmental law. However, here again the victims come up against intolerable **miscarriages of justice** because the courts refuse to adjudicate, claiming it is difficult to investigate, the statute of limitations has run out or that they do not have jurisdiction because the events took place abroad. In 2019, for example, a [German court](#) refused to hand down a ruling in the case of a fire that claimed 258 victims in the Pakistani factories of a supplier of the German discount store Kik, stating that the statute of limitations in the case had lapsed under Pakistani law.

In such circumstances, those who speak out to condemn the impunity of transnational corporations and the disastrous consequences of their activities on the environment and people are the target of **systematic persecutions**. Since 2015, the Business & Human Rights Resource Centre has identified **2,054 cases of violence** in the form of attacks, harassment and murder of rights defenders who have stood up to corporations. In its annual report on the situation of land defenders and environmental activists, Global Witness noted that in 2018, **three environmental defenders were murdered every week around the world**. These numbers, which have steadily increased over the years, remind us of **the need and urgency to move beyond a vision of corporate social responsibility (CSR) that is based almost solely on voluntary commitments**.

MOVING BEYOND VOLUNTARY APPROACHES IN ORDER TO ENSURE PROTECTION OF HUMAN RIGHTS AND THE ENVIRONMENT

Since the 1970s, corporations have increased their voluntary initiatives and have refined their CSR policies in order to respond to the various scandals affecting them. Today, the **UN Guiding Principles on Business and Human Rights** (2011) and the **OECD Guidelines for Multinational Enterprises** (2011) constitute a normative framework of reference for corporate accountability. While these principles set out in a clear fashion the need for States to guarantee access to justice for affected populations and the duty of companies to prevent and remedy damages caused by their activities, these **non-binding** principles are based on the **goodwill of the companies** and are **not backed by sanctions of any kind**.

The National Contact Points (NCP) set up under the OECD Guidelines are an exception and are a rare complaint mechanism available to people wishing to obtain recognition of a contracting company's liability in a transnational

dispute. However, civil society organisations have been denouncing for years their ineffectiveness. The NCPs fail to stop violations and to secure compensation for the victims. More worrisome still is the fact that OECD Watch and the Business & Human Rights Resource Centre have shown that the mere fact of appealing to the NCPs exposes the plaintiffs to more reprisals and violence.

In order to move beyond **declarations of principles** and avoid participating in the **whitewashing of corporate images**, a binding French, European and international legal framework must be established.

THE FRENCH LAW ON THE DUTY OF VIGILANCE: A PIONEERING LAW THAT MUST BE IMPLEMENTED

In 2017, France adopted a law on the duty of vigilance and became the first country to pass legislation to invoke the civil liability of corporations for violations of human rights and environmental law caused by their activities, including their subsidiaries, suppliers and subcontractors abroad.

The law on the duty of vigilance requires all companies with more than **5,000 employees in France and 10,000 abroad** to publish a **vigilance plan in order to identify and prevent negative impacts caused by their activities throughout their value chain**. If they fail to live up to that obligation, legal action may be undertaken in French courts invoking the **civil liability of the parent company or the French contracting company** in order to force the company to obey the law and/or compensate the victims.

Last June and July, **the first formal notices based on the law on the duty of vigilance were sent out**. Total was reminded that it had failed to make commitments to reduce greenhouse gas emissions in its vigilance plan and to respect human rights and the environment in Uganda. **Teleperformance** was officially notified about the need to take steps relating to the observance of its employees' social rights at its call centres, in particular in Colombia.

While this law is a major step forward in the effort to end the impunity of TNCs, **many challenges remain** to ensure its implementation. The government has provided no official list of companies that fall under the law and the first vigilance plans are either missing or incomplete.

In March 2019, CCFD-Terre Solidaire published a study specific to the agrifood sector to highlight and put forward recommendations on certain risks that companies in the sector must address. Along with Sherpa, CCFD-Terre Solidaire also published an initial non-exhaustive list of 237 companies that are subject to the law on the duty of vigilance, along with their vigilance plans, which can be read on the plan-vigilance.org website. CCFD-Terre Solidaire also noted that nearly one-quarter of the companies concerned had not published a vigilance plan as required by law.

In May 2019, the French Minister for the Economy and Finance, Bruno Le Maire, **commissioned France's General Economic Council to evaluate the law** in response to the many requests received from trade unions, associations and Members of Parliament. The Council's conclusions are expected to be issued in the autumn of 2019.

In France, the aim is to achieve an **effective application** of the law and its **reinforcement**. Several laws are being considered and the French national strategy to combat imported deforestation, which contains measures relating to the duty of vigilance in addition to lower thresholds, should help to achieve progress.

INTERNATIONALISATION OF THE DUTY OF VIGILANCE: AN EU DIRECTIVE AND A UN TREATY

The French law on the duty of vigilance was quickly considered by the European Union and the United Nations as an example to be followed. Various EU and UN initiatives are underway with the aim of adopting binding standards relating to corporations and human rights.

In **Europe**, several countries have already undertaken legislative reforms concerning the legal liability of parent companies and contracting companies. The **Netherlands** recently passed a law on the duty of vigilance relating to child labour and in **Switzerland** a popular vote on a Responsible Business Initiative is being pursued. In **Germany**, a preliminary draft law is being debated by government ministries which contains application thresholds much lower than those in France (250 employees in Germany and 40 million euros in annual turnover or 20 million euros in assets). In **Finland, Norway, Spain, Belgium, Luxembourg, the United Kingdom, Slovenia, Sweden, Denmark and Austria**, the issue of how to supervise the activities of transnational corporations and their respect for human rights and the environment is also being debated.

EU institutions are looking into the adoption of **EU legislation on mandatory Human Rights and Environmental Due Diligence**. DG JUST has commissioned a study on the subject, whose conclusions will be released in the autumn of 2019. The European Parliament and its Human Rights Committee also commissioned a study, published in February 2019, on access to justice by people affected by the activities of European companies operating in third countries. A cross-party working group on corporations and human rights, chaired by the Finnish MEP Heidi Hautala (The Greens/European Free Alliance), published in March 2019 a **Shadow EU Action Plan**. 56 French MEPs undertook, during the electoral campaign of May 2019, to back the adoption of such a directive.

In the United Nations, intergovernmental negotiations to draft a binding international treaty on transnational corporations and human rights have been held every year since 2015. A decisive step was taken in July 2019 when the Ecuadorian chair of the working group published a **revised draft** of the treaty. The intergovernmental working group met again in Geneva from 14 to 18 October 2019 for the **fifth session of negotiations**.

While the European Union and a number of OECD member states multiplied **diversionary tactics** over the last years and were **still waiting on the sidelines during this fifth negotiation session**, 245 French members of Parliament sent an **open letter** to French President Emmanuel Macron urging him to “support a draft treaty and to take on the leadership of this fight in the European Union.” That message was taken on board by the government, whose Minister for Foreign Affairs and Europe, Jean-Yves Le Drian, reassured the Parliament of France’s support for the initiative. Across Europe, over 650,000 EU citizens have called for the EU to support a binding Treaty through the campaign “Rights for People, Rules for Corporations” and Members of the European Parliament **continue to speak up** in favour of such **crucial** instrument.

These commitments in favour of a UN treaty and the progress observed in Europe for the adoption of national laws and the development of European legislation on the duty of care are welcome and should be supported. However, they must not conceal the inconsistencies of French and European policy on ISDS arbitration.

ISDS ARBITRATION, PARALLEL COURTS THAT SERVE TRANSNATIONAL CORPORATIONS

“If there ever was a one-sided dispute resolution mechanism that violates basic principles, this is it. [...] It is legal terrorism.”

Joseph Stiglitz, Nobel Economics laureate, speaking on ISDS

Whereas people affected by the activities of transnational corporations encounter serious difficulties obtaining justice and asserting their rights, these corporations benefit from an à la carte system of justice thanks to ISDS arbitration.

Although the European Union is increasing its diversionary tactics to avoid getting involved in negotiations on the treaty covering corporations and human rights, the EU **will however be in Vienna at the same time** to take part in **negotiations** for the creation of a **permanent international court on ISDS arbitration**.

Largely unknown to the general public in Europe, ISDS arbitration was in the headlines of French media when rallies were being held against the Transatlantic Free Trade Agreement (TAFTA) and EU-Canada Comprehensive Economic and Trade Agreement (CETA) in 2015. Tailor-made by the World Bank for transnational corporations in 1965, ISDS arbitration has gradually become the tool of choice for TNCs who wish to nip in the bud any legislation that runs counter to their interests.

Anchored in today’s economy through 3,400 trade and investment agreements, **intra-EU ISDS arbitration was deemed by the European Court of Justice to be against EU law in January 2019**. Nevertheless, the EU continues to promote it vis-à-vis third countries (EU-Canada, EU-Japan, EU-Singapore, EU-Vietnam, EU-Tunisia, etc.), even though it has been demonstrated that these special courts are **detrimental to governments seeking to introduce public policies relating to health, taxation, environmental protection, climate change and human rights**.

The **Hulot oil and gas law** in France is one example among many. In 2017, when the law was being considered by France’s Constitutional Court, the Canadian company Vermillion threatened France with an ISDS procedure if the law as it stood were adopted by Parliament. The result? The Constitutional Council backpedalled and dropped the controversial provisions. The aforementioned case is far from exceptional. Of the **942 instances of ISDS** identified so far, **60% of the cases whose merits were examined were won by investors**. Transnational corporations make the most of that immense power.

Every year, the number of ISDS cases recorded by the United Nations Conference on Trade and Development (UNCTAD) exceeds the record set the previous year. Hedge funds are created in order to advance the legal costs of corporations wishing to sue a State in exchange for a share of the award paid out if the case is won.

It is not surprising that developing countries and emerging economies are the most affected by ISDS procedures. But TNCs are going after all countries, demanding huge sums of money that are a strain on national budgets. The Vattenfall company demanded 4.7 billion euros from Germany when the country announced its abandonment of nuclear energy. The Canadian company Gabriel Resources demanded 4 billion dollars from Romania for the suspension of an open-pit mining project harmful for the environment and the local population. The most recent example is the Barrick Gold company that had invested 200 million dollars in Pakistan, and won an ISDS procedure involving the termination of a mining contract. The three arbitrators recently ruled against Pakistan, requiring it to pay the mining company 5.8 billion dollars in compensation.

Who are the winners? We have moved far beyond the debates about guarantees necessary for Small and Medium Enterprises (SMEs) wishing to invest internationally. **ISDS benefits almost exclusively the big transnational corporations and the wealthiest individuals.** Some 94.5% of the amounts of known convictions were awarded to companies whose annual turnover exceeds **one billion dollars** or to individuals whose fortune amounts to more than **100 million dollars**. And the trade lawyers involved have not been forgotten. The legal fees of a single dispute amount to around 16 million dollars. It is a veritable **industry** that is jealously defended by a handful of trade lawyers and academics who sit on the investment tribunals, work for the same North American and European law firms and teach these same techniques in the most prestigious universities. One statistic reveals the profession's conflict of interest: **the same 14 trade lawyers took part in one half of the ISDS cases identified by UNCTAD.**

Thanks to popular mobilisations against TAFTA and CETA, the European Union became aware of citizens' staunch opposition to the dispute settlement mechanism. But, instead of **renouncing the practice**, as **Brazil** did by refusing to sign trade and investment agreements containing such clauses, along with **South Africa, Ecuador, Bolivia, India, the United States and Canada**, who revoked investment agreements that allowed ISDS when the North American Free Trade Agreement (NAFTA) was being renegotiated, the European Union has in contrast sought to introduce a **cosmetic reform of ISDS** by creating a **permanent international court of arbitration**. It is a hasty proposal designed to perpetuate the impunity of transnational corporations by appointing judges instead of trade lawyers and turning a blind eye to **the direct threat inherent in arbitration between investors and states to democratic ideals and to States' ability to legislate.**

FOR A DETAILED ANALYSIS

ISDS

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REGULATION OF TRANSNATIONAL CORPORATIONS

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OUR PROPOSALS

- Join the Global Interparliamentary Network supporting the UN Treaty on: bindingtreaty.org
- Support the European Parliament's Responsible Business Conduct Working Group founded by the Finnish MEP and Vice-President of the European Parliament, Heidi Hautala (The Greens/European Free Alliance).
- Hold European Commissioners accountable to their answers on these topics during hearings held in the autumn of 2019 and take these issues to the relevant committees and sub-committees (Foreign Affairs, Legal Affairs, International Trade, Development, Human Rights, Economic and Monetary Affairs, Employment and Social Affairs, the Environment and Women's Rights).
- Refuse to ratify any trade and/or investment agreement that contains clauses on arbitration between investors and states (EU-Singapore, EU-Vietnam, EU-Tunisia, etc.).
- Demand an end to negotiations for a Multilateral Investment Court.
- Support the work of the French Permanent Representation in Brussels in order to promote effectively the duty of vigilance in the EU institutions with a view to its expansion throughout Europe and the world.

THE EUROPEAN CAMPAIGN "Rights for people, Rules for Corporations –Stop ISDS"

On 22 January 2019, on the eve of the Davos summit, more than 200 civil society organisations from 16 European countries began a mobilisation campaign to demand an overhaul of international law relating to trade, investment and respect for human rights and the environment by transnational corporations. In France, 46 associations, trade unions and social movements joined the cause, including ATTAC, Friends of the Earth, CGT, Emmaüs International, Fondation Nicolas Hulot, Greenpeace, Institut Veblen, Max Havelaar, Notre Affaire à tous, Secours Catholique, Sherpa and others. So far, more than 600,000 European citizens have signed the petition addressed to the European Union institutions.

CCFD-TERRE SOLIDAIRE

A long-standing advocate for change in more than 60 countries, [CCFD-Terre Solidaire](http://ccfd-terresolidaire.org) takes action against all forms of injustice. We work to ensure that everyone's fundamental rights are respected so that no one goes hungry, that people make a dignified living from their work, live in a healthy environment and choose where to build their life. A more equitable and fraternal world is already in progress because every individual carries within himself or herself a force for change. Our commitment for greater justice and solidarity originates in the Gospel and the Church's social doctrine. Through our individual and collective action we offer and support policy and grassroots solutions.

CONTACTS

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